

STATE OF VERMONT  
HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 15,428
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department of Social Welfare denying her coverage under Medicaid for a commercial food thickener. The issue is whether such a product is covered under the pertinent regulations.

FINDINGS OF FACT

1. The petitioner is a woman who has Huntington's disease, a progressive neurological disorder for which there is no cure. One of the symptoms of her disease is dysphagia, or a difficulty in swallowing, due to poor muscular control in her face and neck. It is medically necessary for her to control the consistency of food she consumes in order to avoid choking on pieces which are too large or aspirating liquids which are too thin into her lungs, putting her at risk for pneumonia. She has had emergency care four or five times in the past year due to choking on foods.

2. The visiting nurses who treat the petitioner, her dietitian, and her speech language pathologist have all recommended to the petitioner that she thicken her foods with "Diafoods Thick-It", a commercial thickener which was developed and is used solely for dysphagia care. Her doctor

has given her a written prescription for "Thick-It" although it is a preparation that can be purchased without one and is available over the counter at most pharmacies. "Thick-It" is considered a superior way to thicken foods compared to traditional flour and cornstarches because the exact consistency needed is easy to achieve and control, it does not affect the taste or appearance of food, and does not "bind" liquids, allowing for better hydration of the patient.

3. The petitioner began using "Diafoods Thick-It" about a year ago and finds that it works very well, much better than other common food thickeners she has tried (flour, cornstarch, and mashed potatoes). However, she uses two to three cans per week which costs her about \$100 per month and for which she now asks Medicaid to pay.

4. The petitioner was denied Medicaid coverage originally and upon review by the Commissioner on March 30, 1998, because "Thick-It" is not "primarily medical in nature". Subsequently, the Department stated that it is denying payment in reliance on the Board's decision in Fair Hearing No. 13,907, which held that food thickeners are "food supplements" and as such are excluded from coverage under the regulations.

5. The petitioner's physician and dietitian have rendered the opposite opinion, saying that "Thick-It" is not a food product or supplement but offering no further

explicit explanation. It appears from the context of their letters that these opinions are based on the fact that "Thick-It" is not used for the purpose of providing nutrition but is used rather to thicken other foods intended to provide the nourishment. In addition, it is only useful to persons who have a disease, dysphagia, and, as the label on the can makes clear, is only marketed to persons suffering from that disease.

6. The evidence shows that "Diafoods Thick-It" is manufactured by Precision Foods, Inc. and is made up of modified corn starch and maltodextrin. The can carries a "Nutrition Facts" label which recites that the product contains 35 calories per 8g (2 tbsp), including 7g of carbohydrates and 20 mg of sodium. A narrative contained on the can also states that it "adds 35 calories per 2 tablespoons for nourishment and it is low in sodium. It helps prevent dehydration because it does not bind fluids. . .ADA Exchange: 1 Tablespoon of. . .Thick-It=1/3 Fruit Exchange=4g Carbohydrates (metabolized like fruit sugar)." "Thick-It" is eligible for purchase with food stamp coupons.

7. Based on the above evidence it is concluded that "Diafoods Thick-It" is a food product or food supplement that is used exclusively to thicken foods for persons suffering from dysphagia.

ORDER

The decision of the Department is affirmed.

REASONS

The Medicaid regulations generally provide that "drugs" are covered by the Medicaid program with certain exceptions:

M810 Prescribed Drugs

Payment may be made for any preparation, except those unfavorably evaluated, either included or approved for inclusion in the latest edition of official drug compendia: the U.S. Pharmacopoeia, the National Formulary, the U.S. Homeopathic Pharmacopoeia, AMA Drug Evaluations, or Accepted Dental Therapeutics. These consist of both "legend" drugs, for which a prescription is required by State or Federal law, and "over-the-counter" medicinals, normally purchasable without a prescription. The only exceptions to this are specified in Sections M811.1-M811.4.

Sections M811.1-4 specifically except from coverage all non-drug items, most amphetamines and appetite depressants, most vitamins and minerals and common over-the-counter medications. The Department maintains that "Diafoods Thick-It" falls into the first non-covered category which provides as follows:

M811.1 Non-Drug Items

No payment will be made for the following items:

Dentifrices and dental adhesives  
Baby Oils  
Mouthwash and gargles  
Soaps and shampoos - non-medicated . . .  
Food products and food supplements; (payment may be made for food supplements (e.g. Sustacal) in cases where a person's nutritional needs can only be met by a liquid high protein diet. Prior authorization from the Division of Medical Services is required.)  
Baby Formula; e.g. Enfamil and Dobee, Similac. . .  
Sugar substitutes, e.g. Saccharin, Sweet's, etc.  
Antiseptics, e.g. Merthiolate, Tincture of Iodine, etc.  
Lotions and liniments, e.g., rubbing alcohol, witch hazel, Musterole, Vicks Vaporub, Ben Gay, etc.  
Band-aids, gauze, adhesive tape, etc.  
Ostomy Deodorants, oral or external  
Patent medicine: e.g., Carter's Pills, etc.  
Tonics; e.g. Geritol, etc.  
Placebo; tablets, capsules, or solutions  
Cough syrups; for which a prescription is not required by State or Federal Law or Regulation.

(Emphasis supplied.)

The Board has previously ruled in Fair Hearing No. 13,907 (which is attached) that food thickeners fall under the rubric of "food supplements" in the above regulation and are thus not eligible for payment. The evidence presented at this hearing supports that ruling because it clearly establishes that "Thick It" is a food product or supplement which is added to other foods to change their consistency.<sup>1</sup>

The fact that "Thick-It" is used therapeutically to ameliorate the difficulties associated with dysphagia, and

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<sup>1</sup> At oral presentation, the Board considered and rejected the petitioner's argument that her treating physician's opinion that "'Thick-it', does not constitute a food product or supplement" is binding on the fact-finder in the absence of any evidence supporting this assertion and substantial evidence to the contrary found on the label of the can.

only used for that purpose, does not turn "Thick-It" into a covered "drug" or change the essential food nature of this substance (edible vegetable matter which provides nutrition and is metabolized by the body as a sugar).

The petitioner has made no argument that the Department illegally excludes non-drug items, particularly food products and supplements, listed in M811.1 from coverage under the Medicaid program. As an item on that list, namely as a food product or supplement, "Thick-It" was correctly excluded from coverage by the Department and the Board is bound, again, to affirm that decision. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 17, Fair Hearing No. 13,907.

The above notwithstanding, the Board strongly encourages the Department to reconsider its policy of refusal to pay for this particular food product in light of the fact that it plays an essential role in the prevention of serious health problems for persons with dysphagia and has no real use other than in the treatment of this problem.

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